

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

**AMENDED MOTION FOR CORRECTION AND RECONSIDERATION
OF MAGISTRATE'S DISCOVERY ORDER OF MAY 10, 2005
AND FOR RELATED DISCOVERY RELIEF**

The Defendant, Hatem Naji Fariz, by and through undersigned counsel, respectfully requests that this Honorable Court (1) correct and reconsider the Discovery Order of May 10, 2005 (Doc. 1038), and (2) reconsider the deadlines for defense counter-translations and defense translations. As grounds in support thereof, Hatem Naji Fariz would show:

On May 10, 2005, pursuant to a discovery conference conducted the previous day, the Honorable Magistrate Judge McCoun ordered that defendant Fariz would be allowed to introduce counter-translations for a specified group of overt acts. Doc. 1038.¹ The counter-translations specified in the instant order, however, are inconsistent with the actual list of defense translations contemplated in the ongoing effort to identify and stipulate to overt act translations by counsel for the government and counsel for Hatem Fariz. The order appears to suggest that other defense translations produced will be excluded if they have not yet been provided to the government.

¹ In the Court's order, the counter-translation attributable to overt act 210 was incorrectly listed. Doc. 1038 at 1 n.1. The correct overt act is 310.

Counsel for Hatem Fariz has attempted to meet all deadlines imposed relating to the production and analysis of the various parties' individual translations and has attempted to fully cooperate with the government and Court to identify what has been described as "true" substantive counter-translations.² Hatem Fariz asserts his intention to preserve his right to introduce any and all evidence necessary to defend himself fully from the instant charges. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) ("The right of the defendant to present evidence stands on no lesser footing than the other Sixth Amendment rights . . . previously held

² Specifically, counter-translations attributable to overt acts 323B, 306, 295A, 173, 295B, 258, 254, 296, 297, 298, 299, 288, 322, 314, and 309 in the superseding indictment have been stipulated to by Hatem Fariz. The government has proposed to stipulate to Fariz counter-translations attributable to overt acts 174, 304, 310, 316, 34, 256, 33, 31, 44, 45, 49, 50, 87, 244, 177, 259, 260, 267, 314, 94, 112, 202, 205, 212A, 253, 261, 262, 269, 271, 272, 273, 278, 289, 291, 292, 293, 294, 301, 302, 303, 306, 309, 311A, 311B, 312, 319A, and 323A in the superseding indictment, and 211.10 in the original indictment, but provided "stipulated translations" which are not identical and sometimes not consistent with the Fariz proposed counter-translations. Counsel for Mr. Fariz are prepared to accept the government's stipulation if, and only if, the government agrees to utilize the Fariz translation or modifies its translation to comport fully with the Fariz translation.

Counsel for Mr. Fariz have also produced counter-translations attributable to overt acts 318, 219 and 320 in the superseding indictment, which directly relate to Mr. Fariz; and, counter-translations attributable to overt acts 40, 38, 77A, 105, 108, 110, 150, 247, 257, 300, 308, 313, 53A, 43A, 111, 37A, 41, 39, 52, 55, 58A, 59, 60A, 62, 64, 65, 68, 69, 70A, 73, 75, 80, 81, 82, 84, 86, 91, 92, 97, 98, 99, 102, 114, 118, 119, 143, 162, 167A, 171A, 190, 218, 226, 238, 241, 242, 166, 195, 203, 212A, 216, 217, 232, 239, 243, 245, 246, 254, 263, 307, 32, 36A, 35, 37A, 42A, 43A, 46A, 47, 48, 53A, 55, 57, 58A, 63, 66, 67, 71, 72, 76, 77A, 83, 93, 96, 101, 106, 109, 116, 120, 121, 122, 125, 126A, 127, 129, 132, 133A, 134, 135, 136, 139, 140, 146, 147, 148, 151, 161A, 163A, 167A, 169A, 175A, 176, 179, 181, 185A, 188A, 189, 196, 213, 228, 60A, 103, 165, 170, 171A, 183A, 192, 194, 195, 197, 199, 200, 201, 206, 209, 221, 225A, 243, 250A, 252, 255, 264, 265, 266, 270, 275, 280, and 281 in the superseding indictment, which do not directly pertain to Mr. Fariz. The government has not offered to stipulate to any of these translations. Furthermore, counsel for Mr. Fariz have produced translations attributable to overt acts 216.5 and 242.16 in the original indictment, of which the government did not produce a counter-translation. The government has not offered to stipulate to these translations.

applicable to the states.”); *United States v. Solomon*, 399 F.3d 1231 (10th Cir. 2005) (finding that the exclusion of material, relevant evidence may deprive a defendant of a fair trial and constitute reversal on appeal).

I. Mr. Fariz Requests that this Court Reconsider its Deadline for the Production of Counter-Translations and Defense Translations

Hatem Naji Fariz prays this Court reconsider its present deadline for the production of counter-translations and defense translations. Despite the Court's concerns for the efficient presentation of evidence during trial of this matter, Mr. Fariz asserts a greater interest in his ability to present a complete defense to the instant allegations unimpeded by arbitrary deadlines. Notably, this Court has repeatedly modified the various deadlines it has imposed upon the parties due to various changes in circumstances. *See, e.g.*, Docs. 605, 824. Generally, these modifications have extended deadlines imposed upon the government. *Id.* The recent order continuing the beginning of the evidentiary portion of the trial to June 6, 2005 (Doc. 1014) provides just such a basis for extending the deadline for production of defense counter-translations and defense translations.

Mr. Fariz's request is further supported by the government's understatements to the Court and the parties concerning the number of translated items that would be at issue in this case. Specifically, the government previously informed the Court that the number of translations that the government would seek to introduce at trial was estimated at a few hundred.³ Accordingly, this Court structured its first order by requiring that the government

³ The transcript of the August 17, 2004 hearing has apparently not been transcribed, but given how the Court structured the government's deadlines, the defense believes that the

provide to the defense translations 100 on October 1, 2004, 100 on November 1, 2004, and the balance by December 1, 2004. (Doc. 605). The government then obtained an extension to file the balance of all of its translations by February 18, 2005, including additional FISA intercepted communications through the Chicago investigation. (Doc. 824).

Following the February 18, 2005 government deadline, defense counsel contacted the government to confirm that the defense had received all of the government translations. The government informed the defense that the government had produced 99% of its transcripts that it would seek to introduce at trial.⁴ Inconsistent with this representation, a constant flow of materials has occurred. Some of these materials were in the government's possession long before their disclosure and, in total exceeded the verbal representations made to this Court by the government. To demonstrate the nature of the production received from the government, Mr. Fariz provides a summary of the productions and other relevant information in the following chart:

government had only estimated less than 400.

⁴ Letter of Federal Public Defender's Office memorializing this conversation with the government, dated February 24, 2005. (Attached as Exhibit A).

Date of Government Letter/Production	Description of Materials
2/19/03	Original indictment
5/03 and 9/03	Cassette tapes of recorded conversations listed as overt acts in original indictment
Trial Date: Jan. 2005	
3/04	Production of tech cuts, approximately 29,000 pages
3/15/04	Production of recorded conversations on Mr. Fariz's phone lines (approximately 11,500 calls)
10/1/04	100 draft translations of FISA conversations and facsimiles
11/1/04	109 draft translations of FISA conversations and facsimiles, websites, and seized documents
Trial Date: 4/4/05	
1/18/05	112 draft translations of FISA intercepts and facsimiles, websites, and seized documents
2/18/05	369 draft translations of facsimiles, websites, seized documents, and other items
2/22/05	64 cassette tapes and 7 CDs containing FISA intercepts from Chicago cases combined list summarizing the Chicago FISA intercepts 472,239 call records contained on a CD
2/25/05	8 cassette tapes and CDs containing FISA intercepts from Chicago cases
3/2/05	70 draft translations of facsimiles, websites, seized documents, and other items
3/7/05	21 revised translations regarding overt acts

Date of Government Letter/Production	Description of Materials
3/9/05	2 cassette tapes containing FISA intercepts from Chicago over 150 pages of English-language summaries or tech cuts from the Chicago FISA intercepts documents “recently received by the FBI”
Trial Date: May 16, 2005	
3/17/05	57 translations, including several overlooked during the government’s February 2005 production and 23 revised overt act transcripts
3/24/05	37 translations, including 7 overlooked during the February production and 30 revised translations relating to the overt acts
3/29/05	50 translations, including some that are revised (and one is described as containing substantive changes)
4/8/05	51 revised and 4 new translations
4/15/05	36 revised translations
4/25/05	65 translations, provided with a letter indicating that the defense has “previously received most of these translations”
05/13/05	55 translations, provided with a letter indicating that the defense has “previously received most of these translations of conversations and faxes”

Mr. Fariz would emphasize a few observations from this summary:

Total Number of Translations

First, the total number of translations that the government has produced to the defense, including both new and “revised” translations, is 1,136. The defense estimates that

the total number of new translations is approximately 700 to 800, greatly exceeding the original numbers that the parties anticipated.

The defense specifically requested that the government provide the defense with some advance notice identifying which conversations it was going to produce, so its translators would not waste time translating calls which the government would never use. The government objected to this request, citing to the fact that Mr. Fariz is only specifically named in fewer than 40 overt acts alleged in the indictment, and complained that “[t]he defendant’s failure to focus on the relevant evidence and to retain translators in a timely fashion is a disingenuous basis upon which to complain about the generous and timely discovery provided by the government in this case.” (Doc. 648 at 4-6). As a result, Mr. Fariz had to proceed with translating all FISA calls listed in the overt act analysis relating to Mr. Fariz without any notice as to what the government may or may not translate.

The government was never required to estimate the number of, or stagger the disclosure of, non-FISA translations. These non-FISA translations turned out to number in the hundreds, as the defense first learned on February 18, 2005.

To date, the government is producing new (and revised) translations to the defense. On May 13, 2005, the government produced 55 translations, with a letter stating that the defense had “previously received *most* of [the] translations of conversations and faxes” (emphasis added). Nearly three months after the Court-set deadline, and three days before jury selection, the government is still producing new translations.

“Stipulation” Process

In addition, the translation “stipulation” process has been thwarted by confusion or misrepresentation. First, Mr. Fariz has not been able to rely on the government’s representations of whether a translation is even a “stipulated” transcript. The government has indicated that a translation is “stipulated” when it has adopted the defendant’s substantive differences in translation. Upon review of these translations, however, Mr. Fariz has discovered that the government has not, in fact, adopted *any* counter-translations. Instead, the government has adopted only what *it* has determined to be the “substantive” differences from the defense counter-translation. Therefore, Mr. Fariz cannot agree to these “stipulated” translations so far as they do not entirely adopt his counter-translation. The government has essentially added another step to this process by asking Mr. Fariz to review these translations for a second time to attempt to reach an agreement. In several instances, after Mr. Fariz has reviewed the “stipulated” translation to determine whether he agrees with the government’s selection of substantive changes, he receives a revised version of that same translation necessitating yet another line-by-line review. This process has added significant amounts of time, not previously anticipated, to an otherwise time-intensive process.

Second, the government has provided translations labeled as “stipulated” translations, inferring that this translation exchange process has occurred. Instead, however, the defense has received several translations labeled “stipulated” which it has never received in the past. Logically, the defense could not have stipulated to a translation it had never seen.

For his part, Mr. Fariz has stipulated to 15 government translations, meaning that Mr. Fariz agrees to the use at trial of the content of the government's translation in its entirety. This should have meant the end of the stipulation process for these 15 translations. However, Mr. Fariz subsequently received "revised" translations for those to which he had already agreed.

Based on the nature of the stipulation process as described above, Mr. Fariz contends that he should not be precluded from further challenges to the translations the government will use at trial.

Defense Translations

Mr. Fariz's defense team has also sought to listen to Mr. Fariz's remaining FISA intercepts for defense use at trial. Mr. Fariz was not provided the 11,500 calls recorded on Mr. Fariz's home and cell phone lines until March 15, 2004, or 13 months after the indictment in this case, and 9 months prior to the original trial date of January 2005. Because so much of Mr. Fariz's translators' time has been used to address the greater number of government translations, Mr. Fariz's ability to prepare defense translations has also been impaired and delayed.⁵

⁵ Mr. Fariz would further note that in the Court's order denying Defendants' motions to suppress the FISA intercepts, the Court expressed that the rationale for disseminating all of the recorded conversations to law enforcement was that law enforcement officers are responsible for ensuring that exculpatory materials are produced to the defense, not foreign counterintelligence agents. (Doc. 968 at 13). The government, however, has never identified any intercepts covered by *Brady* to the defense.

Mr. Fariz believes that the government's production of Chicago FISA intercepts warrants an additional note. In a letter dated October 28, 2004, more than a year and a half after the original indictment in this case, the government for the first time informed the defense that the government had in its possession and intended to use recorded conversations of the Defendants in this case contained on others' wiretaps in the so-called Chicago investigation. At the time, the government provided a list of 82 conversations, and indicated that it was "presently inclined" to use eight conversations in its case-in-chief. The government stated that it had requested the tapes of the actual recorded conversations from the FBI office in possession of them and would provide to the defense the "tech cut" for each conversation "shortly."

Four months later (and at that point less than seven weeks from the April 4, 2005 trial date), the government produced 64 cassette tapes and 7 CDs containing FISA intercepts from the Chicago cases. (Discovery production of February 22, 2005).⁶ The government additionally produced a "combined" list of the conversations, with a brief summary describing the call. The "combined" list now included an additional 22 calls not on the October 28, 2004 letter. On February 25, 2005, the government produced eight additional cassettes and CDs containing conversations from the Chicago wiretaps.

⁶ At this point in time, the government's deadline for the production of transcripts that they intend to use at trial was February 18, 2005. The government was still producing transcripts of some of these calls as of March 2, 2005 and April 8, 2005.

On February 28, 2005, counsel for Dr. Al-Arian filed a second motion for continuance. (Doc. 912).⁷ Counsel for Dr. Al-Arian argued before the Court during the pretrial conferences in early March that they needed additional time to continue reviewing the materials already produced to the defense, plus the new materials only recently produced to the defense, including the Chicago FISAs. At the hearing, counsel for the government conceded that the government had only recently produced the recorded conversations, because the U.S. Attorney's office in Tampa had only recently received them and because they had only recently been declassified.

On March 9, 2005, however, along with two additional cassette tapes containing Chicago FISA intercepts, the government produced English-language summaries or "tech cuts" of the Chicago FISAs. While these tech cuts did reveal that some of the summaries were only declassified in February 2005, several had been declassified by October 2004. Even as to the materials only "declassified" in February 2005, however, counsel for Mr. Fariz submitted applications for background clearances, pursuant to this Court's order, precisely for the purpose of being able to review the materials at issue in this case in a timely fashion. Additionally, as the Court expressed much earlier in the case, these conversations are alleged to involve the defendants; as their own conversations, the government's "classified" label rings hollow.

⁷ Contrary to the government's more recent representations, such as in the government's response to Mr. Fariz's motion to transfer venue, Mr. Fariz has not asked for a continuance since June 2003.

II. Discovery Production from February 2005 to May 2005

For the Court to appreciate the full context of Mr. Fariz's requests, Mr. Fariz would additionally note that in the last three months there has been a spate of government production of various evidentiary materials. Specifically, since the beginning of February, the government has produced, including government transcripts:

Date of Gov't Letter	Description of Materials
Trial Date: April 4, 2005	
2/7/05	2 videos of interviews or media coverage of Dr. Al-Arian 3 cassette tapes of Dr. Al-Arian INS hearings
2/7/05	4 photographs pertaining to Mr. Fariz
2/7/05	88 mirror image copies of media seized during the searches
2/7/05	Israeli documents, alleged crime scene videos of attacks, and CDs with photographs relating to alleged attacks
2/7/05	36 newsletters and magazines from 1B429 (in volume, comprises 3 large binders)
2/10/05	one CD containing the updated indexes of evidence in this case
2/18/05	369 draft translations of facsimiles, websites, seized documents, and other items
2/22/05	64 cassette tapes and 7 CDs containing FISA intercepts from Chicago cases combined list summarizing the Chicago FISA intercepts 472,239 call records contained on a CD
2/25/05	8 cassette tapes and CDs containing FISA intercepts from Chicago cases

Date of Gov't Letter	Description of Materials
2/25/05	<p>1 CD containing photos of various bombs</p> <p>3 CDs containing images and scans from 1B-434</p> <p>1 CD containing images and scans from 1B-433</p> <p>numerous documents in Arabic</p> <p>immigration and USF records regarding Mr. Hammoudeh</p>
3/1/05	<p>reports, video, DVD, and CD pertaining to the explosives demonstrations conducted by the government in the Everglades in November 2004</p> <p>FBI 302 pertaining to review of computer seized from Mr. Ballut (dated 2/16/05)</p> <p>FBI 302 pertaining to review of computer seized from Mr. Fariz (dated 12/23/04)</p>
3/2/05	70 draft translations of facsimiles, websites, seized documents, and other items
3/7/05	21 revised translations regarding overt acts
3/9/05	<p>2 cassette tapes containing FISA intercepts from Chicago</p> <p>over 150 pages of English-language summaries or tech cuts from the Chicago FISA intercepts</p> <p>documents "recently received by the FBI"</p>
Trial Date: May 16, 2005	
3/17/05	57 translations, including several overlooked during the government's February 2005 production and 23 revised overt act transcripts

Date of Gov't Letter	Description of Materials
3/17/05	<p>numerous photographs</p> <p>copies of documents from the INS files of Dr. Al-Arian, Ramadan Shallah, Sameeh Hammoudeh, Mazen Al-Najjar, Bashir Nafi, and Ghassan Ballut</p> <p>copies of bank records from 1B-358 and 1B-370</p> <p>3 alleged crime scene videos from attacks in the Middle East</p> <p>notice to defense that if the defense would like to see mock explosive devices (including the Beit Lid device), the defense should contact a specified agent</p>
3/24/05	37 translations, including 7 overlooked during the February production and 30 revised translations relating to the overt acts
3/29/05	50 translations, including some that are revised (and one is described as containing substantive changes)
3/30/05	composite video of 9 videos seized from Mr. Fariz's residence
4/4/05	Israeli documents previously listed as undiscoverable (Note: most of these are images)
4/4/05	<p>diskette containing Matthew Levitt's (prospective government expert) testimony in another case</p> <p>multiple documents previously marked as undiscoverable: includes tax returns. (Some of these documents are marked as received by the U.S. Attorney's Office in Tampa in August 2001).</p> <p>video of Bay News 9 broadcast on August 1, 2002, containing appearance of Dr. Al-Arian</p> <p>copy of deed of sale of property to IAF in November 1993</p>
4/8/05	51 revised and 4 new translations
4/12/05	Israeli documents and 5 cassette tapes containing interviews of accused attackers, based on a defense request for missing documents

Date of Gov't Letter	Description of Materials
4/12/05	Materials pertaining to experts Paula Ernst, David Smith, and Wynn Warren, proposed government experts in crime scene models. Package includes numerous pages, multiple CDs, large maps, one DVD, and handwritten drawings which were used as background materials by Ernst, Smith, and Warren to create visual aids that the government will seek to have admitted at trial.
4/12/05	<p>Summaries of qualifications of government experts Magdy Samy Tawfik and Danish Bushrui (languages)</p> <p>Reports of examination of Thomas Musheno</p> <p>Report of examination of Daniel Olson, dated 2/7/05, regarding documents submitted for analysis for the presence of codes and ciphers.</p>
4/15/05	36 revised translations

Date of Gov't Letter	Description of Materials
4/18/05	<p>updated statement of qualifications of government expert Mark Whitworth</p> <p>FBI Computer Analysis and Response Team ("CART") reports (dated 2/3/04, dated 12/9/04, dated 2/16/05, dated 2/6/04, dated 5/22/03, dated 5/28/03, dated 5/29/03, dated 5/30/03, dated 6/9/03, dated 7/2/03, dated 7/15/03, dated 1/21/05, dated 2/1/05, dated 4/8/05, dated 7/31/02, dated 7/31/02, dated 10/13/04, dated 10/13/04, dated 10/13/04, dated 1/18/05, dated 2/16/05).</p> <p>Prospective government witness Special Agent Kerry L. Myers' summary of qualifications and summary of potential testimony</p> <p>Prospective government witness Tom Miller's summary of potential testimony</p> <p>Prospective government witness Matthew Levitt's summary of potential testimony</p> <p>CD containing two powerpoint presentations, labeled "Intro to Explosives Intro to IEDs," for prospective government experts Whitworth and Kirk Yeager</p> <p>CD labeled "4 videos" for Whitworth and Yeager</p>
4/18/05	<p>statements of qualifications of experts in internet computer investigation and background materials on alleged PIJ websites, relating to Russ Hayes and Jill Brinckerhoff. The government indicated that they will probably not testify as experts, but were disclosed in case the government decides to seek their opinion at trial.</p>

Date of Gov't Letter	Description of Materials
4/18/05	<p><i>Brady</i> materials:</p> <ul style="list-style-type: none"> FBI memorandum of Interview by Kerry L. Myers (FBI Special Agent) conducted on September 17, 2003, with AUSA Walter Furr in attendance. Person interviewed stated, <i>inter alia</i>, that “at the time of the terrorist attack [alleged as Overt Act 14] against Israeli soldiers that he was not formally part of any specific terrorist organization.” Plea Agreement of prospective government witness (dated 7/30/04) Statement of promises and inducements given to prospective government witness (undated) Statement of psychiatric treatment of prospective government witness, regarding treatment in July 2002. (undated). Statement concerning prospective government witness (undated) Statement concerning prospective government witness (undated, but relating in part to information given to federal agents in 2002) <p>Rule 16 and Discovery Order materials:</p> <ul style="list-style-type: none"> List of unindicted co-conspirators, including numerous unidentified individuals Notice of other crimes, wrongs, and acts pursuant to Federal Rule of Evidence 404(b). Additional reports concerning mail covers

Date of Gov't Letter	Description of Materials
4/22/05	Summaries of qualifications of Yaacov Levi, Avi Shoshan, Yaniv Fadida, and Sagi Matsa (some of these were not previously disclosed as potential government experts)
4/25/05	<p>IRS records for Muslim Students Association of US and Islamic Concern Project, Inc.; Muslim Students Association of the US and Canada; North American Islamic Trust Inc., Chicago Islamic Center; Unknown (Taxpayer ID no. provided); Islamic Fund for Palestine; Islamic Committee for Palestine; and Mobile Health Inc.</p> <p>Articles from the <u>St. Petersburg Times</u></p> <p>Articles from the <u>Tampa Tribune</u></p> <p>Documents pertaining to the Muslim Students' Association of the US and Canada (including Articles of Incorporation)</p>
4/25/05	Israeli documents, based on a defense request for missing documents
4/25/05	65 translations, provided with a letter indicating that the defense has "previously received most of these translations"
5/4/05	CV for Roushdy A. Nakhla, contract linguist
5/13/05	55 translations, provided with a letter indicating that the defense has "previously received most of these translations of conversations and faxes."

Counsel for Mr. Fariz have been working diligently through the various materials that have been provided. Counsel would request that this Court take into consideration the context of the numerous tasks that the defendants have undertaken in order to meet the allegations in this case. Mr. Fariz would therefore respectfully request that this Court reconsider its deadlines concerning defense counter-translations and defense translations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of May, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
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Assistant Federal Public Defender